the offended nation to overlook it, and not to declare war. See *Mr. Webster to Mr. Crittenden*, WHART. INTERNAT. L. DIG., § 21. If this is true, it follows that the petitioner has no claim; for there is a well-settled rule of international law that no citizen or subject gains a right against a belligerent for damages sustained in war between that power and his sovereign. See WHART. INTERNAT. L. DIG., § 224. The case, however, cannot be disposed of on that ground, for there is no evidence in the report of the Board of Inquiry to sustain the assumption that the *Maine* was intentionally destroyed.

On the remaining possible assumption that the *Maine* was destroyed by reason of the negligence of Spain, a similar result would be reached, and on reasoning more nearly in accord with the actual facts. Clearly, if the ship were destroyed negligently, the injury could not be considered a national injury, that is to say, an affront to the dignity of the United States as a sovereign power. The United States would in that case have no greater claim, except by comity, than any steamship company would have if its vessel were destroyed under similar circumstances; and seamen aboard the *Maine* could have no greater rights than American seamen aboard a merchant vessel. According to the *dicta* of the commission they would have even fewer rights. But even assuming that they would have equal rights, it is well settled that they are entitled to no greater protection or rights than the citizens or subjects of the local power. *New Orleans Riot*, Snow's Cases on Internat. L. 181. A Spanish citizen would have no cause of action against his own government if injured by the negligent explosion of a submarine mine. For it will not be seriously controverted that the setting and maintaining of submarine mines are governmental acts; and, consequently, for their negligent performance Spain would not be liable in tort. *Levy* v. *City of New York*, 1 Sandf. (N. Y.) 465; *Belknap* v. *Schild*, 161 U. S. 10, 17. It follows, then, that the petitioner in the principal case having no greater rights than a Spanish subject, could gain no claim against Spain. A short ground for disposing of the case might have been taken. The naval Board of Inquiry reported that it was unable to obtain evidence "fixing the responsibility on any person or persons." Upon that finding, Spain was never liable, and no right ever arose in favor of the petitioner.

RECENT CASES.

ADMINISTRATIVE LAW — RIGHT IN TORT AGAINST FOREIGN GOVERNMENT — BATTLESHIP MAINE CASES. — By Act of Congress, March 2, 1901, the Spanish Treaty Claims Commission was established to adjudicate and settle claims of citizens of United States against Spain which had been relinquished to Spain by the seventh article of the Treaty of Paris, December 10, 1898. Before this commission a seaman injured in the destruction of the Battleship Maine brought a claim for damages. *Held*, that he cannot recover. *McCann* v. *United States*, Before the Spanish Treaty Claims Commission [1902]. See NOTES, p. 137.

BANKRUPTCY — PRIORITY — CLAIMS FOR WAGES. — The Federal Bankruptcy Act, § 64 *b*. gives priority to claims for wages earned within three months before the commencement of bankruptcy proceedings, not to exceed three hundred dollars in amount; and further, to all debts entitled to priority under the laws of the state. The claims in question were for wages not earned within three months before the commencement of the bankruptcy proceedings, but would be entitled to priority under New York

Laws of 1897, c. 24, § 29. *Held*, that they are entitled to priority under the Federal Act. *In re Slomka*, 28 N. Y. L. J. 189 (U. S. Dist. Ct., S. D., N. Y.).

On this point the decisions in the Circuit Court of Appeals are in conflict, and no case seems yet to have been carried to the Supreme Court. See *In re Rouse*, 91 Fed. Rep. 96; *In re Coe*, 109 Fed. Rep. 550. The question is whether the provisions in the Act regarding wages should be construed as excluding priority of all wage claims except as therein specifically provided, or merely as creating a protection for claims for wages not already protected by state laws. The phrase, "not to exceed three hundred dollars," would indicate strongly that claims beyond that amount are to be excluded; and it would seem that the entire clause was meant to be one of positive limitation, and, therefore, to exclude all claims for wages more than three months old. The claim in question being too old to fall within the particular clause as to claims for wages, the court admitted it under the more general class of debts entitled to priority by state law. It would seem, however, that an item excluded by a particular provision should not be regarded as within a more general provision which might otherwise include it. *State* v. *Trenton*, 38 N. J. Law, 64.

BANKRUPTCY — PROVABLE CLAIM — EFFECT OF PART PAYMENT BY SURETY OF BANKRUPT. — The plaintiff was the holder of a bankrupt's promissory note on which, before bankruptcy, the surety had made a part payment. *Held*, that the plaintiff can prove for the full amount of the note. *Swarts* v. *Fourth Nat. Bank*, 117 Fed. Rep. 1 (C. C. A., Eighth Circ.).

By a part payment on the principal obligation a surety acquires an immediate right of indemnity against the debtor, whose debt is diminished *pro tanto*. *Hall* v. *Hall*, 10 Humph. (Tenn.) 352. Nevertheless, under The Bankruptcy Act of 1867 as interpreted by the courts, a creditor who had received such part payment, was allowed to prove for his entire debt to the exclusion of any proof by the surety who had paid only in part. *In re Ellerhorst*, 8 Fed. Cas. 522 The principal case gives the same effect to § 57, *i*, of the present Act. However forced this construction of the statute may appear, the result seems unexceptionable. It is desirable that the creditor be assured of ultimate payment in full, and this result is more certain if the entire dividend from the bankrupt's estate on account of this debt is paid directly to the creditor without first swelling the assets of the surety. Moreover, the surety is not prejudiced by this procedure, for he is equitably entitled to any surplus received by the creditor, and is in the same position pecuniarily as he would be if allowed to prove independently for indemnity, and subsequently obliged to make good the principal's default. *In re Ellerhorst*, *supra*. See also *Swarts* v. *Siegel*, 117 Fed. Rep. 14; *In re Heyman*, 95 Fed. Rep. 800.

CARRIERS — EJECTION OF PASSENGER PRESENTING WRONG TRANSFER CHECK. — A passenger on a street car presented an invalid transfer, which he had received through the mistake of the company's agent, and on his refusal to pay fare, was ejected in accordance with the company's rule. *Held*, that the street car company is liable in damages for the ejection. *Lawshe* v. *Tacoma Ry. & P. Co.*, 70 Pac. Rep. 118 (Wash.).

This decision indicates the tendency of modern authorities. See *Jacobs* v. *Third Ave. R. R. Co.*, 75 N. Y. Supp. 679; *O'Rourke* v. *Citizens' St. Ry. Co.*, 103 Tenn. 124. In many jurisdictions, however, recovery in tort is denied, and the passenger's only remedy is for breach of the contract of carriage. *Bradshaw* v. *South B. R. R. Co.*, 135 Mass. 407. Adoption of one rule or the other must depend upon the view taken as to the reasonableness of the regulation that a passenger be ejected on failure to present a ticket or transfer valid on its face, and refusal to pay fare. In view of practical considerations, *e. g.*, the fraud to which the carrier will be exposed, if he must decide between receiving a questionable ticket and subjecting himself to possible tort liability, the requirement seems reasonable. With regard to railroad tickets, the view has been expressed, that a ticket is not mere evidence of the contract, but is the obligation itself, so that a passenger who presents a bad ticket has no right on the train, regardless of the reasonableness of the regulation concerning ejection. 1 HARV. L. REV. 17; 9 ibid. 353. But this theory is not supported by the decisions, and, whether tenable or not, is inapplicable to a street car transfer, which is in its very nature a voucher.

CARRIERS — TICKETS — NOTICE OF LIMITATION UPON TIME FOR USE. — The plaintiff, a passenger on defendant's train, presented a ticket, purchased two days before. In accordance with the company's rules, the conductor refused to accept the ticket, and ejected the plaintiff. Upon the trial the defendant offered in evidence a large placard, which had been posted at the waiting-room, stating that "All one-way tickets will be limited to the day of sale." *Held*, that in the absence of any evidence

to show that the plaintiff was aware of its contents, the placard is not admissible. *Georgia R. R. Co.* v. *Baldoni*, 42 S E. Rep. 364 (Ga.).

It is well settled that by special contract a carrier may limit his common law obligations, provided the restriction is not one that contravenes public policy. See *Farmers', etc., Bank* v. *Champlain Trans. Co.*, 23 Vt. 186; *The Montana*, 22 Fed. Rep. 715. But it is not enough that knowledge is brought home to the shipper or passenger by a general notice; he must expressly assent to it as forming the basis of the contract. *Cole* v. *Goodwin*, 19 Wend. (N. Y.) 251. On this latter ground a passenger has been held bound by stipulations contained in a ticket signed by himself, or sold at a reduced rate. *Daniels* v. *Florida, etc., R. R. Co.*, 39 S. E. Rep. 762 (S. C.); *Pennington* v. *Phila., etc., R. R. Co.*, 62 Md. 95. In another class of cases, where no special contract is made, regulations detailing the terms on which the carrier will enter into relations with the public are enforced, provided they are reasonable and the plaintiff has actual notice of them. *Boyd* v. *Spencer*, 103 Ga. 828. The principal case seems fairly within this class; but, apart from any question of reasonableness, the failure to fix notice upon the plaintiff is decisive against the carrier. In fact the same result has been reached where the stipulation relied on was contained in a general notice and also printed on the ticket. *Louisville, etc., R. R. Co.* v. *Turner*, 100 Tenn. 213.

CONFLICT OF LAWS — CONCURRENT JURISDICTION OF FEDERAL AND STATE COURTS — NULLIFICATION OF A WILL IN EQUITY. — A bill in equity to set aside a nuncupative will which had been admitted to probate was brought in a United States court, by alien heirs, against an administrator appointed by a state court. *Held*, that the plaintiffs have a constitutional right to sue in the United States court. *O'Callaghan* v. *O'Brien*, 116 Fed. Rep. 934 (Circ. Ct., N. D. Wash.).

There is much confusion as to how far a decedent's estate in the hands of an administrator can be reached by process from a United States court. The rule that property of which a state court has taken jurisdiction, is thereby removed from the concurrent jurisdiction of a United States court, does not necessarily apply to an estate in the hands of an administrator, for it has been held that an administrator is not an officer of the court, within the meaning of the rule that an officer of a court cannot be sued elsewhere without the consent of that court. *Byers* v. *McAuley*, 149 U. S. 608. But it seems well settled that, since in a decision as to the validity of a will there is involved something like a decree *in rem* for which the machinery of a probate court is peculiarly adapted, a circuit court of equity will not take jurisdiction of a suit to annul a will. *Broderick's Will*, 21 Wall. (U. S. Sup. Ct.) 503. While, therefore, the jurisdiction of the court in the principal case may not be open to objection under the former rule, the decision seems clearly opposed to the latter.

CONFLICT OF LAWS — CONTRACTS LIMITING CARRIER'S LIABILITY. — A horse was shipped from New York into Pennsylvania, where it was injured by the negligence of the carrier. As a defense to a suit for damages, brought in the latter state, the defendant set up a contract made in New York limiting his liability to $100. *Held*, that the contract, though valid in New York, is no defense in Pennsylvania. *Hughes* v. *Pennsylvania R. R.*, 51 Atl. Rep. 990 (Pa.). See NOTES, p. 132.

CONFLICT OF LAWS — JURISDICTION OF TORT ON HIGH SEAS — FICTION OF EXTRATERRITORIALITY. — A steerage passenger on board an ocean steamship registered in and sailing from the port of New York was, on the high seas, swept overboard, through the negligence of the company, and drowned. Her administrator sues in the United States Circuit Court for New York. *Held*, that the court has jurisdiction, for the court will construe the territory of New York as covering the vessel while on the high seas. *Lindstrom* v. *International Navigation Co.*, 117 Fed. Rep. 170 (Cir. Ct., S. D. N. Y.). For a discussion of the questions involved, see 15 HARV. L. REV. 408; ibid 411.

CONFLICT OF LAWS — VALIDITY OF FOREIGN MARRIAGE — STATUTE RESTRICTING MARRIAGE AFTER DIVORCE. — A California statute declared void marriage by a divorced person within one year after the decree of divorce, if the former spouse were living. The plaintiff, a woman domiciled in California, was divorced and within a year married again in Nevada, the second husband being also domiciled in California. Upon the latter's death, his estate was administered. *Held*, that the divorce was complete at the time of the decree, that the statute has no extraterritorial operation, and hence that the marriage is valid and the wife entitled to family allowance. *In re Wood's Estate*, 69 Pac. Rep. 900 (Cal.).

The same plaintiff made an ante-nuptial contract with her second husband by which,

in consideration of marriage and of relinquishment by her of all claims on his property, he promised to pay her $10,000. *Held*, that the marriage, though valid, is contrary to the policy of the California statute, and is not good consideration to support the promise. *Wood* v. *Wood's Estate et al.*, 69 Pac. Rep. 981 (Cal.).

The California statute would seem designed to discourage divorce by rendering immediate re-marriage impossible. Such a statute should be distinguished from those which declare parties to a divorce incapable of re-marriage during the period allowed for appeal. The latter acts prevent the decree from effecting a complete separation until that period has expired, the object being to preserve the original marriage so far as necessary to preclude a new one before the first has been finally dissolved. *In re Smith's Estate*, 4 Wash. 702; *McLennan* v. *McLennan*, 31 Oreg. 480. *Cf. Conn* v. *Conn*, 2 Kan. App. 419. In view, therefore, of the apparent purposes of the two classes of statutes, the decision in the first case that a complete separation was immediately effected by the decree seems sound. That the validity of marriage depends on the *lex loci contractus*, not on the *lex domicilii*, seems now well settled and is established by statute in California. *Van Voorhis* v. *Brintnall*, 86 N. Y. 18; *Kent* v. *Burgess*, 11 Sim. 361; CAL. CIV. CODE, § 63. See BISHOP, MAR. DIV. AND SEP., § 843. It is a proper corollary of this doctrine that the statute in the principal case has no extra-territorial operation without words expressly giving it *Van Voorhis* v. *Brintnall*, *supra*. See BISHOP, MAR. DIV. AND SEP., § 869. But the distinction made by the second decision seems hardly tenable. In both cases the plaintiff's claims depend directly on the validity of the marriage, the distinction being merely that the first claim arises by operation of law, the second from express contract of the parties. It would seem, however, that this is not a sufficient reason for distinguishing the cases, and that a decision that this marriage, admittedly valid, is incapable of giving rise to the legal rights which can be founded upon other valid marriages, is doubtful on grounds of policy if not on those of sound logic.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — CONCLUSIVE EVIDENCE. — A statute provides that in any action brought against a railroad company for failure to deliver grain shipped over its line, the bill of lading shall be conclusive proof of the amount received. *Held*, that the statute is unconstitutional as contravening the provision insuring due process of law. *Missouri, K. & T. Ry. Co.* v. *Simonson*, 68 Pac. Rep. 653 (Kan.).

Though the rules of evidence are in general a proper subject for statutory control, it is not within the power of the legislature to enact laws which altogether preclude a party from exhibiting his rights. Consequently, statutes declaring that the presentation of certain evidence shall constitute conclusive proof of a specified fact are generally held unconstitutional, as in the case under discussion. COOLEY, CONST. LIM., 5th ed., 453; *Cairo & F. R. R. Co.* v. *Parks*, 32 Ark. 131; *Wantlass* v. *White*, 19 Ind. 470. But, as pointed out in the strong dissenting opinion, no decision has denied the power of the legislature to give conclusive effect, as against a party, to his deliberate statement, made under the admonition of the statute. Where the basis of the conclusive presumption is a declaration of this nature, and where there is a justification in policy for such legislation, as in the case of the railroad receipts to which the statute in question relates, there seems to be no room for the constitutional objection. *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557.

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — VESTED RIGHT IN THE DEFENSE OF STATUTE OF LIMITATIONS. — A statute imposed a limit of one year on claims against a railroad for damage caused by a change of grade. Shortly after the expiration of the year the legislature extended the period. *Held*, that this act is constitutional, and under it claims previously barred can be prosecuted. *Dunbar* v. *Boston & P. R. Co.*, 63 N. E. Rep. 916 (Mass.). See NOTES, p. 129.

CONTRACTS — TRANSFER OF BONDS — IMPLIED COLLATERAL AGREEMENT PASSING TO ASSIGNEE. — A contractor was entitled by his contract with the defendant railroad company to the proceeds of all stock issued, and to all stock remaining unissued when the road was completed. The company issued stock certificates to a county and took in payment bonds of the county payable to the bearer. These bonds were given to the contractor as proceeds of the sale of stock and were sold by him to the complainants. The transaction between the county and railroad company was adjudged void, and the bonds and stock certificates cancelled. *Held*, that the complainants are entitled to a decree requiring the defendant to issue the stock to them. *Citizens, etc., Assn.* v. *Belleville, etc., Ry. Co.*, 117 Fed. Rep. 109 (C. C. A., Seventh Circ.).

Where a town issued bonds to a railroad in discharge of a contractual obligation, and the railroad sold them to the complainant, it was held that the latter, on the bonds

being declared void, was not subrogated to the railroad's rights under its contract. *Aetna Life Ins. Co.* v. *Middleport*, 124 U. S. 534. The court distinguishes the principal case on the ground that the company delivered the bonds to the contractor under an implied agreement that if the bonds proved void, it would issue to him the stock of whose sale the bonds were proceeds, and that this promise attached itself to the bonds in such a manner that it passed with them to all subsequent vendees. This construction of the contract seems untenable, for since the transaction between the county and the company was void, the stock remained unissued, and the contractor was entitled to it by his express contract. If the complainant has any remedy it would seem to be against his vendor on an implied warranty of the validity of the bonds. But in a similar case, the court refused to imply a warranty. *Otis* v. *Cullum*, 92 U. S. 447.

CRIMINAL LAW — CONSPIRACY — ACQUITTAL OF ALL BUT ONE DEFENDANT. — Three defendants were jointly arraigned on a charge of conspiracy. One of them pleaded guilty and the two others were acquitted on pleas of not guilty. *Held*, that the judgment passed against the one who pleaded guilty must be vacated. *The King* v. *Plummer*, [1902] 2 K. B. 339.

This rule was tacitly assumed by the early English decisions and has been expressly recognized by the later ones. *Rex* v. *Rinnersley*, 1 Str. 193; *Rex* v. *Cooke*, 5 B. & C. 538; *Reg.* v. *Manning*, 12 Q. B. D. 241; *Reg.* v. *Thompson*, 16 Q. B. 832. Indiana and North Carolina have adopted it as to indictments for adultery and fornication. *Turpin* v. *State*, 4 Blackf. (Ind.) 72; *State* v. *Mainor*, 6 Ired. (N. C.) 340; *State* v. *Rinehart*, 106 N. C. 787. Texas and Tennessee repudiate it. *Alonzo* v. *State*, 15 Tex. App 378; *State* v. *Caldwell*, 8 Baxt. (Tenn.) 576. The view of the last two jurisdictions seems more in accord with reason. To support the doctrine, the sole reason given is that, since these offenses are necessarily joint ones, two verdicts of guilty and not guilty would be mutually repugnant. This reasoning does not rightly apply to cases of adultery, for there one of the defendants might be a party to the joint act without having the criminal intent necessary to constitute the crime; for example, when he acted under a *bona fide* mistake of fact. And even in cases of conspiracy the repugnancy on the record is more apparent than real — since the verdict of not guilty for the first defendant amounts to little more than not proved — and is far outweighed by the repugnancy between the second defendant's acquittal, and facts clearly proving his guilt.

CRIMINAL LAW — DOUBLE JEOPARDY — FORMER TRIAL FOR LESSER CRIME. — *Held*, that a conviction for assault and battery is a bar to a subsequent prosecution for assault with intent to kill. *People* v. *McDaniels*, 69 Pac. Rep. 1006 (Cal.).

The better view and the weight of authority are to the effect that conviction for a lesser crime is a bar to prosecution for the greater crime of which the lesser is a constituent part. *Reg.* v. *Elrington*, 9 Cox C. C. 86; *Moore* v. *State*, 71 Ala. 307. See *contra*, *State* v. *Hattabough*, 66 Ind. 223. It is clear that a conviction or acquittal of the larger charge should bar a prosecution for the smaller, since generally by statute a defendant can be convicted on any indictment of a lesser crime necessarily included within the indictment. The objection of double jeopardy is equally strong to bar a subsequent prosecution for the higher offense after trial for the lower. As authority against the above view, some cases have been cited to the effect that conviction for assault is no bar to prosecution for homicide after the victim's death. *Reg.* v. *Morris*, 10 Cox C. C. 480; *State* v. *Littlefield*, 70 Me. 452; *Johnson* v. *State*, 19 Tex. App. 453; *Stewart's Case*, 5 Irv. 310 (Scotch). These cases, however, have generally recognized the rule, as here stated, while declaring it inapplicable when the greater crime does not exist at the time of the first prosecution.

DAMAGES — AVOIDABLE CONSEQUENCES — BREACH OF CONTRACT OF SALE. — The vendor in a contract for the sale of coal had agreed to give sixty days credit. At the time fixed for delivery, he broke his contract by refusing credit, but subsequently offered the coal to the vendee at a cash price less than the market price. *Held*, that the subsequent offer cannot be shown in mitigation of damages. *Coxe* v. *Anoka, etc., Co.*, 91 N. W. Rep. 265 (Minn.).

The general rule is that for the breach of a contract of sale the vendee can recover only the additional cost of securing the goods elsewhere, and compensation for any incidental injury suffered. *Gainsford* v. *Carroll*, 2 B. & C. 624; *Benton* v. *Fay*, 64 Ill. 417. It is held that an employer who has broken a contract for services is allowed to show in reduction of damages that he subsequently offered the servant re-employment, unless the offer was made on the condition that on its acceptance the breach should be waived. *Bigelow* v. *Am. Forcite Powder Mfg. Co.*, 39 Hun (N. Y.) 599; *Whitmarsh* v. *Littlefield*, 46 Hun (N. Y.) 418. Losses which follow a breach of a contract of sale,

but which would have been averted had the vendee availed himself of reasonable opportunities to purchase elsewhere, would not seem to be consequences of the breach, but of the vendee's carelessness. See *Beymer* v. *McBride*, 37 Ia. 114. The fact that it is the defaulting vendor who offers the opportunity should not vary the case; the vendee may, if he chooses, reject the offer, but if he does so, he cannot charge the vendor with losses which he would not have incurred had he accepted it. *Parsons* v. *Sutton*, 66 N. Y. 92; *Lawrence* v. *Porter*, 63 Fed. Rep. 62.

DECEIT — FALSE STATEMENT OF CONSIDERATION IN A DEED. — The plaintiff declared that she had bought certain notes secured by property deeded to a trust company; that a consideration was stated in the conveyance which grossly misrepresented the value of the property, and this was done by the defendant for the purpose of cheating and defrauding the plaintiff and others; that she had relied on the statement in buying the notes, and that the notes are worthless. The defendant demurred. *Held*, that the statement of value in the deed having been made, as alleged, in pursuance of a scheme to defraud, the declaration states a cause of action. *Leonard* v. *Springer*, 197 Ill. 532, reversing the same case below, in 98 Ill. App. 530. For a discussion of the decision in the lower court, see 15 HARV. L. REV. 576.

EQUITY — SPECIFIC PERFORMANCE — MISTAKE AS A DEFENSE. — The defendant at an auction sale purchased the plaintiff's land, mistaking it, because of deafness, for another parcel of land. The contract price was not exorbitant for the parcel actually bought. *Held*, that equity will compel specific performance of the defendant's contract. *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266.

At law, it is no defense to an action on a contract that the defendant misunderstood the terms of the plaintiff's offer. The parties are bound by a reasonable construction of their expressed intention. See *Preston* v. *Luck*, 27 Ch. D. 497; *Rowland* v. *N. Y., N. H., & H. R. R.*, 61 Conn. 103, *contra*. Courts of equity, however, although admitting the existence of a contract, refuse in some instances to apply their extraordinary remedy of specific performance against a defendant who has contracted solely through a mistake, even though the mistake was not induced by the plaintiff. *Mansfield* v. *Sherman*, 81 Me. 365. The principle underlying the cases seems to be that equity will not enforce a contract when it would be inequitable to do so. If, however, the mistake is unreasonable or occasioned by the defendant's negligence, it is not allowed as a defense unless specific performance would occasion "hardship amounting to injustice." *Tamplin* v. *James*, 15 Ch. D. 215. In the principal case the defendant seems clearly to have been negligent. Moreover, the price paid was not exorbitant, and no hardship on that score would result. It is probably true that it is something of a hardship to compel him to take land that he had not intended to buy; but, on the whole, the case seems to be a proper one for specific performance.

ESTOPPEL — FAILURE TO ASSERT A RIGHT. — The plaintiff, having discovered that her signature had been forged to a release of dower in a deed of land made by her husband, neglected to notify the grantee. The defendant, who had no notice of the fraud, purchased the land from the grantee without the plaintiff's knowledge. *Held*, that the plaintiff is not estopped to claim her dower. *Hunt* v. *Reilly*, 52 Atl. Rep. 631 (R. I.).

The court regards it as decisive that the plaintiff had no knowledge of the defendant's intended purchase. Yet, where there is an actual misstatement, if it is one addressed to the public, knowledge that any particular person is about to act upon it is immaterial. *Richardson* v. *Silvester*, L. R. 9 Q. B. 34. By analogy it would seem that the plaintiff, having left uncontradicted before the public a misrepresentation likely to be acted upon at any time, should be estopped to set up the truth against one who has been misled. The court also relied largely upon a case in which a failure to give notice of a recorded mortgage was held not to raise an estoppel. *Viele* v. *Judson*, 82 N. Y. 32. It is true that when, as in that case, one's right is a matter of record, there is no duty to make it known, and hence no fraud in silence. *Kingman* v. *Graham*, 51 Wis. 232. But in the principal case it was the fraudulent title, and not the true one, that appeared on the record, and therefore the case relied on seems not to support the decision.

EVIDENCE — HEARSAY — SUPPLEMENTING TESTIMONY BY CONTEMPORANEOUS MEMORANDA. — To impeach the defendant as a witness in his own behalf, the prosecution offered his evidence given through an interpreter at the preliminary examination. For this purpose, the interpreter testified that he had accurately repeated in English the defendant's statements, and the official stenographer testified that he had reported

the interpreter's translation *verbatim*. *Held*, that the stenographer's report is hearsay and the admission of it was error. *People* v. *John*, 69 Pac. Rep. 1063 (Cal.).

Though the stenographer's notes may serve as a report of the testimony of a witness who testifies through an interpreter, they are obviously hearsay when the precise language of the witness is the subject of proof. *People* v. *Ah Yute*, 56 Cal. 119; *cf.* 15 HARV. L. REV. 859. But when, as in the principal case, the interpreter is also on the stand under oath and subject to cross-examination the hearsay rule ought not to apply. See THAYER, PREL. TREAT., EV. 501. The notes, however, can be used, if at all, not as independent evidence, but merely to supplement the interpreter's testimony. The rule on this point ordinarily is that when, as is probable in the principal case, a witness has no independent recollection, he may aid his testimony by his own contemporaneous memorandum or by that of another verified by him when made. See *Acklen's Executor* v. *Hickman*, 63 Ala. 494. Obviously the stenographer's notes are not within this rule. However, as all the parties to the transaction are before the court and under oath, the accuracy of the notes can be practically assured. This being true, it would seem wise to extend the rule so as to permit the use of such a memorandum as this. The step has, indeed, been taken in some jurisdictions. *Cf. Mayor, etc., of N. Y.* v. *Second Ave. R. R. Co.*, 102 N. Y. 572; 1 GREENL. EV., 16th ed., § 439 b.

EVIDENCE — SUBSEQUENT DECLARATIONS OF INTENTION. — In a criminal prosecution for assault, after prior threats by the accused had been proved and other circumstantial evidence had been introduced, a declaration made by the accused eight or ten days after the alleged assault, to the effect that he would kill the assaulted person, was offered in evidence. *Held*, that the subsequent declaration was properly admitted as evidence of the existence of a guilty intent in the mind of the accused at the time of the crime. *Jones* v. *State*, 32 So. Rep. 793 (Fla.).

It is the modern doctrine that a prior declaration of intention is admissible to prove the commission of the act to which the declaration relates, if sufficiently close in point of time. *Mutual Life Insurance Co.* v. *Hillmon*, 145 U. S. 285. This is because declarations are competent evidence of a material mental state, and the existence of an intention to do an act is material as showing that it was ultimately done. By reasoning that the existence of a state of mind at the time a declaration is made tends to show its existence at an earlier time, it has been said that a declaration of belief or intention made subsequent to the alleged act is similarly admissible. GREENL. EV., 16th ed., § 162 e. But such a declaration is of so slight probative value and so likely to receive undue weight, that its admissibility may well be questioned. This appears to be the better view as to post-testamentary statements, the most common example of declarations of a subsequent mental state. See 15 HARV. L. REV. 149. But so far as the declaration in question is concerned, it seems to have been properly admitted as confirming the inference from the prior threat that the act was done, by showing that the vicious intent continued. Here the objections suggested above have no place.

INTERNATIONAL LAW — STATUS OF DEPENDENCY OF FOREIGN STATE — JUDICIAL QUESTION. — By a treaty with France, tartar was dutiable at 5 per cent *ad valorem*. An importer of tartar from Algeria claimed the benefit of that provision. The United States contended that Algeria was not a part of France. *Held*, that it is a judicial question, and the court will receive evidence of the French law. *Tartar Chemical Co.* v. *United States*, 116 Fed. Rep. 726 (Circ. Ct., S. D., N. Y.). See NOTES, p. 134.

JUDGMENTS — PASSING TITLE BY JUDGMENT IN TROVER — RES JUDICATA. — The plaintiff having obtained a judgment in trover against the defendant for the value of a chattel, which judgment remained unsatisfied, subsequently brought replevin against the defendant to recover the chattel. *Held*, that the plaintiff is barred by the previous judgment against him, and the property in the chattel is now vested in the defendant. *Singer, etc., Co.* v. *Yaduskie*, 59 Leg. Intell. 367, 11 Pa. Dist. Ct. Rep. 571. See NOTES, p. 131.

JUDGMENTS — RES JUDICATA — IDENTITY OF PARTIES AND SUBJECT MATTER. — The plaintiff was the driver of a wagon which was injured by collision with the defendant's car. He was also a member of the firm which in a prior action had obtained a verdict for the injury to the wagon, thus establishing the defendant's negligence and the exercise of due care by the plaintiff in relation to the wagon. The plaintiff brought the present action for personal injuries sustained in the collision. *Held*, that the verdict in the former action is conclusive in regard to the questions of the defendant's

negligence and the plaintiff's contributory negligence. *Cahnmann* v. *Metropolitan St. Ry. Co.*, 37 N. Y. Misc. 475 (Sup. Ct., App. Term).

Since a partnership is not a legal entity, all actions are brought by or against the several partners jointly. *Metal Stamping Co.* v. *Crandall*, 17 Fed. Cas. No. 9,493 c. Consequently the plaintiff was a party to the prior action; and the fact that he was but one of several joint plaintiffs would not permit him to relitigate the matters there decided. *Wilson* v. *Buell*, 117 Ind. 315. But to render matter *res judicata* it is requisite that the subject matter of the prior and present actions should be identical. *Benz* v. *Hines*, 3 Kan. 390, 397; *Palmer* v. *Hussey*, 87 N. Y. 303. This was not the fact here, the subject matter being respectively injury to property and injury to the person. Moreover, the plaintiff could not have recovered in that action for injuries in which he alone had an interest. *Gray* v. *Rothschild*, 48 Hun (N. Y.) 596; *Rhoads* v. *Booth*, 14 Ia. 575. Since, therefore, the prior verdict did not conclude the plaintiff as regards his personal injuries, the doctrine of mutuality should prevent him from claiming its benefits. See *Goodnow* v. *Litchfield*, 63 Ia. 275. Nor was the question of the plaintiff's contributory negligence in relation to himself necessarily settled by the prior action, since it is conceivable that by jumping the plaintiff could have avoided personal injury even after the collision and damage to the wagon had become inevitable. There seems to be no authority directly in point.

PROCEDURE — SERVICE ON CORPORATION — OFFICER OF FOREIGN CORPORATION WITHIN STATE. — The code of North Carolina allows service of summons on a foreign corporation when it can be made in the state on the president of the corporation. CIV. CODE, § 217, subsec. 1. *Held*, that service on the president of a foreign corporation while in the state is sufficient to give the state court jurisdiction, although the corporation was doing no business in the state. *Jester* v. *Baltimore, etc., Co.*, 42 S. E. Rep. 447 (N. C.).

Statutory provisions similar to that in the principal case are not uncommon; and it is generally held that judgments rendered on such statutory service are valid for every purpose within the State. *Pope* v. *Terre Haute, etc., Co.*; 87 N. Y. 137; *Col. Iron Works* v. *Sierra Grande M. Co.*, 15 Col. 499. When, however, the statute does not expressly mention foreign corporations, some courts hold it applicable to domestic corporations only. *Newell* v. *Great Western Ry. Co.*, 19 Mich. 336. There can be no doubt that a state legislature has power to determine what shall be sufficient service to support judgments of the state courts within the state. Service by publication affords an example of the exercise of this power. *Mason* v. *Messenger*, 17 Ia. 261. But a judgment obtained on constructive service such as this will not be recognized in other states. *Latimer* v. *Union P. Ry. Co.*, 43 Mo. 105. Nor will such service be considered sufficient in event of the case being removed to the Federal courts. *Goldey* v. *Morning News*, 156 U. S. 518. It would seem, therefore, that the defendant corporation might have put in a special appearance, removed the case to the Federal court on the ground of diversity of citizenship, and there obtained a dismissal because of the insufficiency of the service. See *Goldey* v. *Morning News*, *supra*.

PROPERTY — FIXTURES — EFFECT OF NEW LEASE ON TENANT'S RIGHT OF REMOVAL. — Premises were let to a firm for a certain term. Before its expiration one partner retired and the landlord cancelled the lease, giving the other partner a lease for the remainder of the term identical except for a power of assignment in the lessee. *Held*, that it is not such a new leasing as will prevent the tenant from removing trade fixtures previously erected. *Baker* v. *McClurg*, 64 N. E. Rep. 701 (Ill.). For a discussion of the question involved, see 15 HARV. L. REV. 853.

PROPERTY — NATURE OF GOODWILL. — An Indiana statute taxed "all property within the jurisdiction of the state, not specially exempt." *Held*, that the goodwill of a newspaper is not "property" within the act. *Hart* v. *Smith*, 64 N. E. Rep. 661 (Ind., Sup. Ct.). See NOTES, p. 135.

PROPERTY — NUISANCE — RECOVERY BY LESSEE. — A lessee took property, knowing that it was affected by a private nuisance. *Held*, that the lessee can recover the depreciation in the rental value. *Bly* v. *Edison Electric Illuminating Co.*, 172 N. Y. 1, reversing the judgment in 54 N. Y. App Div. 427. For a discussion of the decision in the lower court, see 14 HARV. L. REV. 547.

PROPERTY — WATERCOURSES — RIGHTS OF NON-RIPARIAN OWNERS. — The plaintiffs, neither owning nor leasing any land abutting on a river, leased from a power company the right to draw water from the power-canals which it had dug above its dam upon the river. A city higher up the stream was impliedly authorized by statute to

drain its sewage into the stream. *Held*, that the plaintiffs can recover in an action against the city for pollution of the water. *Doremus* v. *City of Paterson*, 52 Atl. Rep. 1107 (N. J.).

In England a riparian owner cannot assign his water-rights as against upper or lower proprietors, but can create only a contract right against himself. *Stockport Waterworks Co* v. *Potter*, 3 H. & C. 300; *Ormerod* v. *Todmosten Mill Co.*, 11 Q. B. D. 155. The English decisions have been expressly followed in *Gould* v. *Eaton*, 117 Cal. 539 But other American cases seem somewhat to discredit the doctrine. See *Hall* v. *City of Ionia*, 38 Mich 493; *Gillis* v. *Chase*, 67 N. H. 161; *St. Anthony Falls Co.* v. *Minneapolis*, 41 Minn. 270. The principal case was complicated by a question of eminent domain. Even if the plaintiffs had merely a contract right against the power company, such right was property which ought not to have been taken for public use without just compensation. See LEWIS, EMINENT DOMAIN, § 263, and cases cited. It would seem, therefore, that the case is sound. But, aside from distinctions of this nature, it seems that the English rule should be followed. The natural rights which are an incident of riparian ownership are in the nature of easements, strictly appurtenant to the riparian land. Few principles are more firmly established than that the owner of a dominant tenement cannot assign in gross an easement appurtenant to it. *Akroyd* v. *Smith*, 10 C. B. 164.

RAILROADS — MAINTENANCE OF CROSSING — STREET RAILWAY CROSSING RAILROAD IN STREET. — A steam railroad had tracks in a public street. A street railway constructed a line across it in an intersecting street. *Held*, that the steam railroad is entitled to an injunction restraining the street railway from running cars over the crossing until it has agreed to pay the expenses of maintaining the crossing. *Central Pass. Ry. Co.* v. *Philadelphia W. & B. R. Co.*, 52 Atl. Rep. 752 (R. I.).

A railroad which is owner in fee of its right of way is allowed compensation for the injury to its property and business resulting from the crossing of its tracks by a new line, and the burden of maintaining the crossing is also placed on the new line. *Lake Shore, etc., Ry.* v. *Chicago etc., R. R.*, 100 Ill. 21. But where the tracks of the railroad are laid in the street, the company's right is subject to the public easement of travel, and since a street railway is generally held to be an instrument through which the public exercises this right, a railroad is not allowed compensation for resulting inconvenience to its business when its tracks in the street are crossed by a street railway. *Buffalo, etc., R. R.* v. *New York, etc., R. R.*, 72 Hun (N. Y.) 587; *Chicago B. & Q. R. R.* v. *West Chicago St. Ry.*, 156 Ill. 255. In making alterations in the rails and roadbed of the railroad, the street railway is, however, exercising a privilege which is not given to the general public, and the holding of the principal case that the expense of maintaining these alterations must be borne by the street railway, seems unassailable. No other decision upon the precise point has been found.

STATUTE OF FRAUDS — PROMISES PARTLY WITHIN AND PARTLY WITHOUT THE STATUTE. — The plaintiff conveyed mortgaged premises to the defendant as security for a loan. The defendant agreed orally to pay the interest on the mortgage and to reconvey the premises upon payment of the loan. Upon the defendant's subsequent refusal to reconvey, the plaintiff obtained a decree for reconveyance and then instituted this suit for breach of the agreement to pay the interest. *Held*, that the Statute of Frauds is a defense, since the contract is indivisible and the reconveyance was not voluntary. *Bradford* v. *McQuestion*, 64 N. E. Rep. 688 (Mass.).

Generally, where a promise partly within and partly without the Statute of Frauds is indivisible, the statute is a good defense to an action on the part without the statute. *Thayer* v. *Rock*, 13 Wend. (N. Y.) 53. The reason sometimes assigned is that to allow the action would have a direct tendency to compel performance of the part within the statute. See *Wetherbee* v. *Potter*, 99 Mass. 354, 361. But after a voluntary performance of the part of the promise within the statute, this reason fails, and an action upon the part without the statute is properly permitted. *Page* v. *Monks*, 5 Gray (Mass.) 492. The reason fails equally when the performance is involuntary, as in the principal case. If the decision is to be supported, therefore, a different theory must be adopted, and the cases allowing an action on the part of the promise without the statute after voluntary performance of the part within must be made to rest upon the ground that the promisor has waived his defense by the voluntary performance. Of course an involuntary performance cannot be regarded as a waiver.

TAXATION — PROVISIONS FOR EQUALITY AND UNIFORMITY. — A statute provided that "all real and personal estate liable to taxation shall be estimated and assessed . . . at its full and true value." An injunction was prayed to restrain the collection from

the shareholders of part of a tax on certain stock, on the ground that it was assessed at its full value, whereas the realty of New York was deliberately assessed at only 60 per cent of its full value. The defendant demurred. *Held*, that it is not a case for equitable interference. *Mercantile Nat. Bank* v. *Mayor, etc.*, 172 N. Y. 35. See NOTES, p. 136.

TORTS — LIABILITY OF CUSTODIAN FOR ESCAPE OF SMALLPOX PATIENT. — A railroad company in performance of a contract with its employees to care for them while sick, negligently provided an incompetent attendant for a delirious smallpox patient. The patient escaped and infected the plaintiff. *Held*, that the company is liable. *Missouri, etc. Ry. Co.* v. *Wood*, 68 S. W. Rep. 802 (Tex., Civ. App.). See NOTES, p. 133.

TORTS — LIABILITY FOR EXPLOSIVES — INTERVENTION OF WILLFUL ACT OF THIRD PARTY. — The defendant kept five thousand pounds of gunpowder stored in a populous neighborhood. This powder was maliciously exploded by an employee, and the plaintiff's house near by was damaged. *Held*, that, under the circumstances, keeping the powder was a nuisance, and the defendant is liable absolutely. *Kleebauer* v. *Western Fuse and Explosives Co.*, 69 Pac. Rep. 246 (Cal.).

That one who keeps large quantities of explosives in a populous neighborhood is guilty of creating a nuisance, and is liable for all damage resulting, irrespective of negligence, seems to be well-settled law. *Heeg* v. *Licht*, 80 N. Y. 579; *McAndrews* v. *Collerd*, 42 N. J. Law 189. And it is held that the liability is none the less although the explosion was caused by lightning. *Cheatham* v. *Shearon*, 1 Swan (Tenn.) 213, 55 Am. Dec. 734; *Prussak* v. *Hutton*, 30 N Y. App. Div. 66. It therefore seems not a very long step to the decision in the principal case which, on the precise facts, seems to be one of first impression. Large stores of explosives in inhabited neighborhoods are so extremely hazardous that it is reasonable to impose this absolute liability although the nuisance *per se* may be only a small or remote part of the cause of the damage. Explosion cases must be distinguished from cases like *Rylands* v. *Fletcher*, L. R. 3 H. L. 330. In that class of cases the danger arises from an agency less likely to do damage, and is not so extreme as to create a nuisance. In such cases the intervention of a third party is held to exempt the defendant from liability. *Box* v. *Jubb*, L. R. 4 Ex. D. 76.

TORTS — LOOK AND LISTEN RULE — STREET RAILWAYS. — The plaintiff drove onto the tracks of an electric street railway at a crossing, and was struck by a car which he had not seen, but might have seen in time to avoid the accident had he looked. *Held*, that the rule requiring a man to look before crossing a railroad is applicable to an electric railway. *Beerman* v. *Union Ry. Co.*, 52 Atl. Rep. 1090 (R. I.). For a discussion of the question involved, see 14 HARV. L. REV. 234.

TORTS — SLANDER — PROOF OF MALICE — REPETITION OF SLANDER AFTER COMMENCEMENT OF SUIT. — After the commencement of an action for slander, the defendant repeated the slander to another person. *Held*, that evidence of the latter slander is not admissible to show the malicious character of the former, since it is in itself the ground for another action. *Swindell* v. *Harper*, 41 S. E. Rep. 117 (W. Va.).

Malice, like motive, may be proved, if material, by evidence of other reasonably proximate acts or declarations of the defendant. *Thurston* v. *Wright*, 77 Mich. 96, 101; *Williams* v. *Miner*, 18 Conn. 463, 472. It is generally held immaterial that such declarations were made after suit was brought. *True* v. *Plumley*, 36 Me. 466, 478; *Zeliff* v. *Jennings*, 61 Tex. 458, 464. But in the case of a subsequent publication of a libel or slander, the jury is to be cautioned against giving damages for the subsequent publication as such. *True* v. *Plumley*, *supra*. New York, and possibly Tennessee, are in accord with the principal case in holding that the later defamation cannot be introduced as evidence of the malicious character of the previous publication, if an action would lie for such subsequent publication itself. *Frazier* v. *McCloskey*, 60 N. Y. 337; *Howell* v. *Cheatham*, Cooke (Tenn.) 247. This view would seem to be due to a failure to notice that evidence of the subsequent publication is not introduced as in itself a ground of damages, but only as evidence of the character of the prior publication, and so of the proper amount of exemplary damages; while in a separate action for such subsequent defamation the damages would be solely for the publication itself.

TRUSTS — CHARITABLE TRUSTS — GIFT OF CEMETERY. — A deed of land was made to certain school districts for the purpose of establishing a cemetery. The grantees were incapable of taking the legal title. *Held*, that the deed created a charitable trust. *Hunt* v. *Tolles*, 52 Atl. Rep. 1042 (Vt.). See NOTES, p. 128.

TRUSTS — CONFUSION OF TRUST FUNDS — FOLLOWING TRUST RES. — A trustee deposited in a bank to his own credit funds held in trust for the plaintiff. Subsequently he deposited to the same account a second sum, a part of which was his own property and the remainder a trust in favor of one Moors, the proportions not being exactly ascertainable. The trustee afterwards drew upon the account for his own use, thereby reducing it to a sum admittedly less than the interest of Moors. The trustee having become bankrupt, the plaintiff claimed priority on the balance of the account. *Held*, that he cannot trace his trust fund into this balance and must come in with the general creditors. *In re Mulligan*, 116 Fed. Rep. 715 (Dist. Ct., Mass.).

While this result does not seem open to question, the grounds adopted by the court are not altogether clear. Where a trustee mingles trust funds with his own bank account, drafts made by him for his own purposes are, as against the *cestui*, charged to the trustee's share until it is exhausted. *In re Hallett's Estate*, 13 Ch. D. 696. See *National Bank* v. *Conn., etc., Ins. Co.*, 104 U. S. 54. The remainder is then entirely a trust fund, and further drafts by the trustee must, of course, directly affect the beneficiaries. In such cases the law seems settled that, as between the two trust funds, these wrongful drafts are charged to the one first deposited. *In re Hallett's Estate, supra.* See LEWIN, TRUSTS, 10th ed., 1096. The uncertainty regarding the exact amount of Moors' interest should not prevent the application of this rule, since the ultimate balance was less than the sum admittedly due him, and hence the wrongful drafts must have been greater than the petitioner's interest, which would, therefore, be extinguished. It would seem that the decision should have been based expressly on this rule, and the balance held subject to the claim of Moors as *cestui que trust.*

BOOKS AND PERIODICALS.

PROPOSED MODERNIZATION OF THE LAW OF DEFAMATION. — Current dissatisfaction with the present state of the law of slander and libel finds somewhat violent expression in a recent article. *Absurdities of the Law of Slander and Libel*, by James C. Courtney, 36 Am. L. Rev. 552 (July–August, 1902). Mr. Courtney points out the extent to which the modern law on the subject follows the artificial presumptions and harsh rules of the sixteenth century, and urges sweeping statutory changes. He argues that the plaintiff is too greatly favored, and would remedy the situation by compelling him to prove damage affirmatively in all cases, by giving the defendant greater leeway in establishing the substantial truth of his statement, and by allowing the defendant to show by specific instances that the plaintiff did not deserve the reputation alleged to have been injured.

It will be conceded that the law on libel and slander crystallized too early, and that the delay in freeing it from the old arbitrary rules has been unfortunate. Progress, however, has been made. For example, truth is now universally recognized as a complete defence in civil actions. *Haynes* v. *Spokane Chronicle Pub. Co.*, 11 Wash. 503; see ODGERS, LIBEL AND SLANDER, 3d ed., 192. So, too, evidence that the plaintiff's reputation is bad is admissible in mitigation of damages. *Scott* v. *Sampson*, 8 Q. B. D. 491. Such gradual reform has undoubtedly been beneficial, and perhaps further changes are desirable. But the revolutionary legislation proposed by Mr. Courtney seems to err on the side of radicalism as much as does the present law on the side of conservatism.

In discussing the author's first suggestion, that the presumption of damage to the plaintiff be abandoned, it must be admitted that the old line between words actionable *per se* and words requiring proof of special damage was not drawn in accord with twentieth century ideas, and that there has been unfortunate reluctance to change it. But modifications in this, too, have been made, though not always in the direction of increasing the plaintiff's burden; for instance, the charge of unchastity in a woman has been declared actionable *per se*, and thus the worst error has been rectified. To force the plaintiff in every case to prove